83-1699

No. ——

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1983

MARIO GIGANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Where highly prejudicial newspaper publicity about the defendant comes to the attention of all but two jurors on the eve of their deliberations, and where the information set forth therein would have been inadmissible at trial and tended to corroborate the prosecutor's witness on an essential issue at trial, do the Court's supervisory powers and the guarantee of due process require that a mistrial be declared even though the jurors themselves claimed they could remain fair and impartial?

II. Where the evidence suggests Governmental complicity in the disclosure of adverse publicity

can the court deny a defendant a hearing based solely upon self-serving representations by the prosecutor that his office was not involved in the disclosure?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at --- F.2d --- (2d Cir.1984), and is reprinted in the Appendix at A-1. The opinion of the United States District Court for the Southern District of New York on Petitioner's application for a mistrial and a hearing is unreported, but is reprinted in the Appendix at A-15.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1984. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S. §1254(1).

STATEMENT OF THE CASE

Petitioner was tried on a nine count indictment charging a conspiracy to make and collect extortionate extensions of credit and eights counts of making and collecting extortionate extensions of credit, in violation of 18 U.S.C. §892 and 18 U.S.C. §894.[1] In brief, the government's claim was that Petitioner Mario Gigante was a loanshark; that the co-defendant, Michael Vodola, was a collector for Petitioner; and that Ralph Sirabella, the prosecution's key witness, was a loanshark victim.

Petitioner denied any involvement. His defense was a challenge to Sirabella's credibility, with strong emphasis on the absence of independent

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[1] The original indictment contained three other counts. These counts were dismissed near the conclusion of the Government's case upon the motion of the Government.

corroboration of Sirabella's testimony. Sirabella, who had been cooperating with the FBI for a period of time, had taped his conversations with co-defendant Vodola. There were no tape recorded conversations between Sirabella and Petitioner.

In the absence of any hard evidence proving that Petitioner had committed the crimes charged, the Government transformed the trial into a series of accusations that Petitioner was involved in organized crime, that he was responsible for crimes by others, and that he had frightened potential witnesses into not testifying against him.

These deliberate attempts by the Government to divert the jurors' attention from the specific crimes charged to the sensational and

frightening spectre of organized crime and its stereotypical concomitants were met by defense motions for mistrials and other appropriate relief. Thus, for example, the prosecutor -- in his opening statement -- characterized Petitioner as "a loanshark who was connected to organized crime" who also ran a "bookmaking operation". The prosecutor asked his witness the following leading and loaded "question": "Now did there come a time when you met this loanshark connected with organized crimes, Mario?" Again the defense sought a mistrial after the prosecutor elicited testimony that the witness was concerned about money he owed an unrelated person named Tom Russo. The defense objected as well when the Government introduced evidence that the witness' apartment may have been

burglarized by unknown intruders. Finally, the trial court's patience was strained when the prosecutor put his final question to his principal witness: "Mr. Sirabella, as you sit here today, are you still afraid?" Defense counsel immediately rose to object, and the objection was sustained. But the witness answered anyway: "Yes, I am." The defense moved for a mistrial, and the judge -- obviously disturbed by the direction the trial was taking -- said he was inclined to grant a mistrial. He announced that he was leaning "55% to 45%" in favor of granting it, and that his law clerks were split over the issue. But after a weekend recess, he denied the motion.

Matters became worse as the trial progressed. The Government's summation, for example, was replete with allusions

to organized crime, unrelated crimes, and frightened witnesses. Again mistrial was sought.

Finally, on March 7, 1983, after the prosecution summation, before the defense's summation and less than two days before the case went to the jury, counsel for the government called to the Court's attention an article which appeared in the Sunday, March 6, edition of the New York Daily News. The article, the first in a series, was headlined "Mob Joined Army" and appeared over the by-line of D.J. Saunders and Paul Meskil. Its first paragraph read:

> Mob bosses leased a 33-acre site at the free world's largest and busiest military water terminal and turned it into a base for criminal activities, including cargo thefts, illegal gambling, loan sharking, labor racketeering and extortion, according to an FBI affidavit filed in federal court.

The article continued on page 69 of the newspaper where the "Mob Joined the Army" caption was repeated. In a box directly underneath that title, four photographs appeared -- including one of Petitioner Gigante. A title directly below the photographs proclaimed, "Here's your Jersey Mob Scorecard," and beneath that, Petitioner was described as an alleged Genovese capo who "works for and reports to the acting boss," his brother Vincent Gigante.

The Court, on its own initiative, indicated that it would question the jurors to determine whether they had seen the article and whether it would influence their thinking. Before the questioning of the jurors began, counsel for the defendant suggested possible governmental misconduct based on the timing of the article and the alleged

FBI sources. The prosecutor, indicating similar concern, reported that he had already contacted the FBI in Newark and had been told that apparently there was a leak in the FBI office. Counsel for defendant Vodola made an application for a hearing at which the reporter could be questioned about his sources, but the request was denied.

Ten jurors indicated that they had read, glanced at, seen, heard about or discussed the article (T 1539-40,[2] 1542-43, 1544, 1546, 1548-49, 1551, 1552, 1553-54). Each claimed, however, that it would not affect his or her thinking about the case (T1540). Only two jurors said they had not seen

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2 "T" refers to the pages of the transcript of the trial.

anything in the newspapers about the case and had heard no talk in the jury room about it (T1541, 1552).[3]

Defendants renewed the application for a hearing as to how it came about that the article appeared after the Government's summation and one day before defense summation. The court again denied the application, stating that there was no indication that anyone in the government had leaked the information. Defense counsel's protestation that only a hearing would ferret out such information went unanswered.[4]

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[3] Both alternates indicated that they heard discussions about the article. (T1557-59).

[4] The March 6, 1983 article was, indeed, the first in a series. On March 7, a second article appeared under the headline "Best cops money can buy" based again on the 165-page FBI affidavit and purporting to

(footnote continued)

The jury began deliberating at 12:40 p.m. on March 8, 1983. Over the next three days the jury repeatedly asked some very specific questions, sought very specific testimony, and requested

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(footnote continued from previous page) detail further mob operations in New Jersey (Ex. 3 to renewed motion for a mistrial). This article stated, "The Daily News obtained a copy of the affidavit." On March 8, the third installment appeared, again based on the affidavit and run under the title "A union of mob interests." (Ex. 4 to renewed motion for a mistrial) And there was a fourth, the following day: "Mob firm wins 15M fed pact." (Ex. 5 to renewed motion for a mistrial)

The next month, a further article by Paul Meskil appeared in the Daily News. This one carried the title "Probe mob's Bayonne link" and reported that as a result of the Daily News' series, the Justice Department had commenced investigation of reported mob infiltration of the U.S. Army's Military Ocean Terminal in Bayonne (Ex.6). What is remarkable, though, is the article's next paragraphs which read:

A Justice Department spokesman

(footnote continued)

transcripts of all tape recorded conversations. On March 11, 1983, at 3:15 p.m. the jury returned verdicts of guilty against Petitioner on Counts 1, 2, 5, 6, 8, 9 and verdicts of not guilty on Counts 3, 4, 7.

Petitioner renewed his motion for a mistrial and for an evidentiary hearing as to governmental misconduct in

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(footnote continued from previous page) disclosed yesterday that the agency also is conducting a separate investigation to determine how the News obtained an FBI affidavit containing extensive details of the Genovese mob's New Jersey operations including the reported MOTBY enterprise and the alleged police corruption.

In a series of articles titled "The Mob and the Waterfront," the News disclosed portions of the affidavit which was filed in federal court to support FBI requests for search warrants for several Genovese mobsters and mob associates. A Newark Federal Court judged ordered the affidavit sealed, but an unsealed copy was obtained by the News from public files in Manhattan Federal Court.

connection with the newspaper stories. The Government, in response, submitted an in camera affidavit by Jo Ann Harris, Executive Assistant United States Attorney and a letter dated May 13, 1983 by John S. Martin, Jr., the United States Attorney for the Southern District. The affidavit indicated that in May 1982, the Newark Organized Crime Strike Force drew up papers in support of an application for a search warrant which were shown to, but not retained by, an Assistant United States Attorney in the Southern District. On May 19, 1982 Judge Goettel signed the warrants and a 120-day sealing order. The papers were sealed in the Magistrate's Clerk's office. The file was unsealed at the end of the 120-day period, which elapsed on September 24, 1982, sent to the District Court Clerk's Office,

docketed, and placed in the public closed files. Although the Newark Strike Force obtained additional 120-day sealing orders from Judge Goettel, those orders were not connected with the search warrant to which they applied. On March 11, 1983, a search of the papers in the public district court files was made and one of the 165-page affidavits was missing. The affidavit further revealed that the investigation of the matter remained open, thus the request that the affidavit be reviewed in camera and sealed.

The letter from Mr. Martin dated March 13, 1983 merely summarized the results of the investigation conducted by his office and concluded that it did not appear that any person in his office was responsible for the

dissemination of the papers. On June 10, 1983, Judge Stewart denied the defense motion in an opinion.

On June 15, 1983, Petitioner was sentenced to eight years on each count, the terms to run concurrently. Co-defendant Vodola was sentenced to thirty months imprisonment.

On February 21, 1984, the United States Court of Appeals for the Second Circuit rendered a unanimous decision affirming the conviction. In an opinion by Judge Kearse (concurred in by Judges Mansfield and Pratt) the Court held that the trial court has broad discretion as to whether to grant a mistrial because of adverse publicity and that here there had been no abuse of that discretion. As to Petitioner's contention that a hearing should have been ordered, the Court held that

Petitioner had not made a sufficient showing of misconduct by the Prosecutor to require a hearing.

REASONS FOR GRANTING THE WRIT

I. THE GUARANTEE OF DUE PROCESS AND THE COURT'S SUPERVISORY POWERS REQUIRE DECLARATION OF A MISTRIAL WHERE HIGHLY PREJUDICIAL NEWSPAPER PUBLICITY ABOUT THE DEFENDANT COMES TO THE ATTENTION OF ALL BUT TWO JURORS ON THE EVE OF DELIBERATIONS, NOTWITHSTANDING THE FACT THAT THE JURORS THEMSELVES CLAIMED THAT THEY COULD REMAIN FAIR AND IMPARTIAL.

That publicity adverse to the defendant may prejudice jurors, prevent a fair trial, and deny the defendant due process is a fundamental principle of American criminal law. As Justice Holmes observed three quarters of a century ago, "[t]he theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907). When jurors read or see

publicity adverse to the defendant in the course of a trial, the most cherished value in our judicial system -- that of an unbiased and impartial jury -- is threatened. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, 366 U.S. 717 (1961). Accordingly, it is well established that the communication to a juror of material outside the record in a criminal case is presumptively prejudicial. Remmer v. United States, 347 U.S. 227, 229 (1954). See also Marshall v. United States, 360 U.S. 310 (1959) (per curiam); Murphy v. Florida, 421 U.S. 794, 798 (1975). The Courts of Appeals for the Third, Fifth and Sixth Circuits have explicitly

recognized this presumption of prejudice. See, e.g., Martin v. Warden, 653 F.2d 799, 804-05 (3d Cir. 1981), cert. denied, 454 U.S. 1151 (1982); United States v. Williams, 568 F.2d 464, 469 (5th Cir. 1978); Goins v. McKee, 605 F.2d 947, 951 (6th Cir. 1979).

The Court of Appeals for the Second Circuit elevated the trial court's discretion to determine whether prejudicial publicity during a trial requires the grant of a mistrial to such a point as to vitiate the teachings of this long line of decisions of this Court. The presumption of prejudice which the government has been required to rebut was here either ignored or deemed

rebutted by factors which have been rejected by this Court as capable of rebutting the presumption:

> In a case in which (1) the publicity does not focus directly on the issue of the defendant's guilt or innocence with respect to the charges of the ongoing trial, (2) much of the potentially prejudicial matter has been adduced as competent evidence at trial, (3) the trial judge has taken prompt action to determine the effect of the publicity on the jurors, and (4) the judge has given or offered to give cautionary instructions, we will rarely second-guess his assessment that the jury's impartiality was not prejudicially affected by the publicity. (A-7-8)

The four factors listed by the Court of Appeals either did not exist in this case or were not significant. Thus, the court was compelled to strain to fit this case into the novel category of cases it had just created. In any event, the category is one which finds

no support in law. And, the standard the Court of Appeals adopts is incoherent and unworkable.

The Daily News story, blaring its charges of the defendant's involvement in a vast range of fantastic crimes, posed a grave threat to the guarantee of jury impartiality that this Court has so steadfastly demanded. See Irvin v. Dowd, supra; Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Marshall v. United States, 360 U.S. 310 (1959) (per curiam).[5]

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[5] There can scarcely be dispute that the Daily News article created a danger of substantial prejudice to Gigante -- as the trial court itself found. Courts have used four indicia to determine the danger of prejudice: (1) the character or nature of the information published and the extent to which it is sensational; (2) the timing of the publication in relation to the trial; (3) the credibility of the (footnote continued)

The Court of Appeals' attempt to minimize the prejudice inherent in the article's references to organized crime -- its assertion that "the jury had already heard considerable evidence to

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(footnote continued from previous page)
source to which the information is attributable; and (4) the pervasiveness of the publicity as determined by the extent of the audience and the interest evoked. United States v. Goodman, 605 F.2d 870 (5th Cir. 1979), quoting Gordon v. United States, 438 F.2d 858 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

Under each of these four tests, the Daily News article posed an enormous danger of prejudice to Gigante. The allegations in the story were sensational in the extreme. They included claims that Gigante was high in the organized crime hierarchy and part of an organized crime infiltration of a United States Army installation, that his brother was "acting boss" of the "Jersey Mob," and that Gigante was involved in a litany of illegal activities. The paper carried headlines with words like "loan sharking" and photographs above a headline, "Here's Your Jersey Mob Scorecard". In the context of this
(footnote continued)

the effect that Gigante was a member of organized crime and was prone to violence" to explain Sirabella's alleged fear of Gigante -- cannot stand as the law. These were hotly contested

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(footnote continued from previous page)
case, no doubt can exist that the character of this sensationalistic material created a very real danger of prejudice to Gigante.

Nor can there be any doubt that the timing of the article further heightened the danger of prejudice. Published immediately after the prosecution's summation, just prior to the defense summation, and a mere two days before the case went to the jury for determination of guilt or innocence, the timing was devastating for the Petitioner. No opportunity existed for the taint of the hostile, sensationalistic publicity to dissipate; if the article, the headlines, the photos were seen by a juror, their impact would surely carry over into the juror's deliberations two days later.

Similarly, both the credibility of the source and the pervasiveness of the medium further cast a specter of potential prejudice over the jury deliberations. The Daily News
(footnote continued)

facts; the Court of Appeals' position assumes that the jury believed the questionable testimony of Sirabella and the prosecution's theory of guilt. It is precisely the fact that the article tended to corroborate the prosecution's theory of the disputed facts which rendered the article so highly prejudicial. And it is this fact which, contrary to the Court's

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(footnote continued from previous page) reporters -- D.J. Saunders and Paul Meskill, both veteran journalists -- quoted an "FBI affidavit" based on information from "informants and surveillance reports" collected during an extensive six-year investigation with the use of "bugs, wiretaps, hidden tape recorders and other electronic surveillance devices." The quoted source thus lent the story an aura of credibility and accuracy. Finally, the publicity was extremely pervasive with the gigantic Daily News circulation and readership, and with the enormous interest evoked by the sensationalistic story.

assertion, links the newspaper publicity to the issue of guilt or innocence on the crimes charged.

Indeed, on appeal, Petitioner argued that the government's repeated references at trial to his alleged ties to organized crime were themselves prejudicial. The Court of Appeals for the Second Circuit upheld the propriety of the references to organized crime, noting that they were admissible to show the debtor's belief that extortionate means would be used to collect on the extensions of credit. The Court of Appeals thus drew a distinction between evidence purporting to show that Petitioner was in fact associated with organized crime and evidence as to the victim's belief that Petitioner was a member of organized crime. The newspaper article, of

course, made no such distinction. It connected Petitioner to organized crime and was wholly irrelevant to the question of the victim's state of mind.

The prejudicial impact of such evidence is identical to the prejudice discussed by this Court in Marshall v. United States, supra:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. Cf. Michelson v. United States, 335 U.S. 469, 475, 93 L.Ed. 168, 173, 69 S.Ct. 213. It may indeed be greater for it is then not tempered by protective procedures.

360 U.S. at 312-13.

Compounding the error, the District Court and the Court of Appeals failed to recognize that reliance upon the individual jurors' self-serving

proclamations of continuing impartiality is always inappropriate, and was particularly so here.

This Court has repeatedly warned that jurors' own statements attesting to their impartiality after exposure to prejudicial publicity must be viewed with healthy skepticism. Such skepticism was essential given the particular history of the case, where the jurors had previously been specifically admonished not to read newspapers articles about the trial or to discuss the case among themselves (T3-4, 107-09, 144-63) and where they had already plainly violated that directive. As this Court said in Irvin v. Dowd, 366 U.S. 717, 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration ... is often its father.

This Court made explicit the applicable rule of law in Murphy v. Florida, 421 U.S. 794, 800 (1975), when it said:

> ... the juror's assurances that he is equal to this task cannot be dispositive of the accused rights ...

The question of continued impartiality is one of mixed law and fact. It is, therefore, the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors. Irvin v. Dowd, supra, at 723, citing Reynolds v. United States, 98 U.S. 145, 156 (1878). The Second Circuit trivializes this necessary evaluation by ignoring the presumption of prejudice and by magnifying the role of trial court discretion.

Finally in this regard, the Court of Appeals' reliance on the length of deliberations and the apparent care

taken by the jury in reaching its conclusions turns logic on its head. The jury, which was out for four days, acquitted Petitioner on some counts while convicting him on others. Logically these facts point to the conclusion that the jury was troubled by the proof offered by the Government and suggests that the prejudicial publicity may well have been the critical factor pushing the jury over the line to a verdict of guilty instead of not guilty.

To safeguard Gigante's rights and the impartiality of the trial process, a mistrial should have been declared. To protect Gigante's rights and the important values of an objective criminal justice system, this petition for certiorari should be granted.

II. THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM REQUIRES THAT A HEARING BE HELD WHERE SUBSTANTIAL EVIDENCE SUGGESTS POSSIBLE GOVERNMENT COMPLICITY IN THE PREJUDICIAL PUBLICITY.

In light of the evidence suggesting possible governmental complicity in the prejudicial publicity, defense counsel requested a hearing. Apparently fearful of holding a hearing at which a newspaper reporter could be called as a witness, the trial court failed to observe the special safeguards established precisely for situations in which government misconduct or negligence looms as a possible source for the prejudicial publicity.

The Court of Appeals, ignoring the strong evidence of governmental misconduct, accepted the prosecutor's theory as to how the Daily News reporter secured the information for

the story [a random reading of the public docket book] and then held that "Gigante has made no showing of prosecutorial misconduct and no hearing was required." (emphasis added)

In this case, the Daily News article purported to rely on confidential government documents. The timing of the publication was extremely auspicious for the government. The prosecutor raised the possibility of a leak in the Newark FBI office which resulted in the Daily News' discovery of a voluminous FBI affidavit. A subsequent report in the Daily News indicated that the Justice Department was investigating the leak, but, raising more questions than it answered, claimed that, although a Newark federal judge had placed the

affidavit under seal, a copy existed in the public files of the Manhattan Federal Court.

When the matter was first brought to the attention of the court, counsel for defendant requested a hearing to determine the reporters' informational sources. That application should have been granted.

With the circumstances strongly suggesting possible complicity, the trial court chose to rely on the uncrossexamined and conclusory assertion of the United States Attorney that no prosecutor had been involved. With all due respect to the United States Attorney for the Southern District of New York, neither the defendant nor any court is bound to accept as true the United States Attorney's sworn hearsay report that his office was not involved

in the leak of the government documents on the eve of the jury deliberations. The United States Attorney represented a party in this action, and, implicitly or explicitly, he advocated a position. A full hearing, in which accepted truth-determining processes would have been employed, could have gotten to the bottom of this matter.

The Court of Appeals placed an impossible burden upon the defendant when it held that "Gigante has made no showing of prosecutorial misconduct." The facts available to Gigante surely point to misconduct and the government did not ever attempt to describe a set of facts consistent with the government's innocence which reasonably explains how the Daily News reporters acquired access to the affidavit upon which the article was based. A wholly

hypothesized "random reading of the public docket book" (a suggestion made by the government in an affidavit sealed by the district court) surely does not establish governmental innocence. Compare United States v. Wilson, 715 F.2d 1164, 1169 (7th Cir.), cert. denied, 104 S.Ct. 434 (1983) (trial court's finding that there was no foundation for allegation that government attorneys had leaked information to the press was proper where those attorneys denied participation, where there were specific indications in the news articles that no information had been provided by government attorneys, and where "leaked" information had been in government attorneys' possession for

months, but none of the "leaks" occurred until after the information had been released to defense counsel).

But even if no members of the prosecution were involved, if any government official was involved, a serious breach of professional responsibility occurred. Governmental misconduct beyond the Office of the United States Attorney for the Southern District of New York is relevant to this concern. If a clerk in the courthouse, or a member of the Newark Strike Force, United States Attorney's Office or FBI was responsible for the leak to the press, the United States Attorney's Office for the Southern District of New York might be vindicated, but Gigante would still have been prejudiced by governmental misconduct. Whether such governmental

misconduct requires, as a matter of due process or by reason of this Court's exercise of its supervisory powers, reversal of a conviction, is a key question worthy of consideration by this Court. By denying the request for a hearing the courts below barred Petitioner from ascertaining the relevant facts.[6]

On the peculiar facts present here, a hearing was indeed required. Gigante's showing of possible governmental misconduct was substantial. The Court's insistence

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[6] Rule 8(b) of the Criminal Rules for the Southern District provides, in part:

> All courthouse personnel, including among others, marshalls, deputy marshalls, court clerks, bailiffs and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court ....

that he prove his claim of impropriety in order to establish entitlement to a hearing for the purpose of proving impropriety is inappropriate. Since the facts point toward governmental misconduct to force Petitioner to show "prosecutorial" misconduct without affording a hearing is to impose an impossible burden.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.[7]

Respectfully submitted,

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April 16, 1984

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[7] By highlighting the issues relating to adverse publicity as the reason for granting certiorari Petitioner does not waive any of the other allegations of impropriety raised in the Court of Appeals.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 376—August Term, 1983

(Argued: November 4, 1983

Decided: February 21, 1984)

Docket No. 83-1229

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARIO GIGANTE,

Defendant-Appellant.

Before:

MANSFIELD, KEARSE, and PRATT,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, convicting defendant-appellant of

making extortionate extensions of credit, using extortionate means to collect such extensions of credit, and conspiring to commit both substantive offenses, in violation of 18 U.S.C. §§ 891, 892, 894, & 2 (1982).

Affirmed.

BRUCE A. BAIRD, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Robert S. Litt, Assistant United States Attorney, New York, New York, on the brief), *for Appellee*.

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Nathan Z. Dershowitz, Dershowitz & Eiger, New York, New York, on the brief), *for Defendant-Appellant*.

KEARSE, *Circuit Judge*:

Defendant Mario Gigante appeals from a judgment entered in the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, after a jury trial, convicting him and a codefendant, Michael Vodola, of two counts of making extortionate extensions of credit, two counts of using extortionate means to collect such extensions of credit, and two counts of conspiring to commit those substantive offenses, in violation of 18 U.S.C. §§ 891, 892, 894, & 2 (1982).

Gigante was sentenced to concurrent eight-year terms of imprisonment on all six counts.[1] On appeal, Gigante asserts that he was denied a fair trial principally because of (1) prejudicial publicity to which the jury was exposed on the eve of its deliberations, (2) erroneous evidentiary rulings by the trial court, and (3) improper questioning by the prosecutor. We affirm the judgment of conviction.

I. BACKGROUND

Gigante and Vodola were indicted in a twelve-count indictment charging them with one count of conspiring to make extortionate extensions of credit and to threaten violence as a means of coercing repayment, in violation of 18 U.S.C. §§ 891 and 892 (count 1); six counts of making specified extortionate extensions of credit, in violation of §§ 891, 892, and 2 (counts 2-7); one count of conspiring to collect repayments by extortionate means, in violation of §§ 891 and 894 (count 8); and four counts of using extortionate means to collect repayments, in violation of §§ 891, 894, and 2 (counts 9-12). Counts 4, 5, and 10 were dismissed on motion of the government before the close of its case.

A. *The Evidence of Gigante's Loansharking Activities*

The government's proof at trial, the sufficiency of which is not challenged by Gigante, was presented primarily through the testimony of loanshark victim Ralph Sirabella, tape-recorded conversations Sirabella had with Vodola and other persons, Sirabella's written records of

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[1] Gigante remains free on bail pending the outcome of this appeal. Vodola, who has not appealed his conviction, is presently serving the sentence imposed on him.

the payments he made to Vodola and Gigante, and Vodola's written records of payments he collected for Gigante from Sirabella and others. Sirabella, a butcher by trade, was a lifelong gambler who frequently borrowed money from loansharks to meet his gambling debts. In 1977, Sirabella met Vodola, with whom he placed bets; when Sirabella needed more money to cover his bets, Vodola told him about a man named Mario who Vodola said was connected to organized crime and would lend Sirabella money. Soon thereafter, Vodola introduced Sirabella to Mario Gigante, who loaned Sirabella $10,000, which Sirabella was to repay at the rate of $200 per week until he had paid a total of $20,000. Vodola described to Sirabella how other persons who owed money to Gigante were beaten when they failed to make payments on time.

At the same time, Sirabella owed money to other loansharks, two of whom beat him and threatened him late in 1979 when he failed to pay them on time. Unable to keep up with all of the payments due all of the loansharks, Sirabella told Vodola about the beating he had received and asked for help. In early 1980, Vodola and Gigante consolidated all of Sirabella's loans, doubled the total amount of his outstanding debt to an amount in excess of $200,000 while giving him no cash, and arranged for a repayment schedule of $600 per week. Gigante threatened Sirabella on several occasions when he was late with his payments, and once punched him in the face. In January of 1981, afraid for his life, Sirabella went to the FBI for help. He began to tape record conversations he had with Vodola, during which he was threatened repeatedly with what Gigante would do to him if he failed to make his payments.

In early February 1981, Sirabella found that his apartment had been entered in his absence by someone with a

key and that his tape recorder, which showed he had been cooperating with the FBI, had been tampered with. The evidence revealed that Sirabella's landlord, who had keys to the apartment, was acquainted with Gigante. Following the break-in, Vodola behaved in a markedly more friendly manner toward Sirabella; he made no more threats, he no longer demanded payments, and he volunteered that Gigante would help Sirabella get a bank loan if he needed one.

B. *The Publicity During Trial*

Trial had commenced on February 16, 1983. On Friday, March 4, the government presented its closing argument to the jury; defense summations were scheduled for Monday, March 7. On Sunday, March 6, the *New York Daily News* published a lengthy article about organized crime activity on the New Jersey waterfront, mentioning loansharking as one of the activities in which the mob engaged. The article was accompanied by a picture of Gigante, whom the article described as an "alleged Genovese capo." The article cited as its source "an FBI affidavit filed in federal court."

The prosecutor notified the trial court promptly on Monday morning about the article's appearance. In response to defense counsel's query about how it happened that the article was published shortly before the case was scheduled to go to the jury, the prosecutor responded that he had inquired of an FBI agent in Newark, who had told him that "as far as they could tell there had been some kind of leak, that the reporter had gotten hold of something that he shouldn't have gotten hold of. It was in no one's interest." The defendants moved for a mistrial and for an evidentiary hearing into the possibility of prosecutorial misconduct leading to the publicity.

The court proceeded to question each of the regular and alternate jurors individually, with counsel present, as to their awareness of and reactions to the *Daily News* article. Four jurors said they had seen the article, eight others said they had heard the article mentioned in the jury room, and two jurors said they were unaware of the article. Each juror assured the court that the incident would not affect his ability to render a fair and impartial decision. The court was satisfied that neither the jury as a whole nor any of its members had been prejudicially affected by the article, and it denied defendants' motions. It offered to give a cautionary instruction, which defense counsel declined. After trial the court adhered to its decision, denying a renewed motion by Gigante for a mistrial and a hearing. (Memorandum Decision dated June 10, 1983 ("June 10 Decision").)

C. *The Verdicts*

The jury deliberated for four days. During its deliberations it requested a number of exhibits, transcripts of all of the tapes in evidence, the replaying of some of the tapes, and the rereading of some of the testimony. Eventually the jury found Gigante and Vodola guilty on both conspiracy counts (1 and 8), on two counts of making extortionate extensions of credit (2 and 7), and on two counts of using extortionate means to collect such extensions of credit (11 and 12). It found each defendant not guilty on counts 3, 6, and 9.

II. DISCUSSION

On appeal Gigante contends principally that the district court should have granted a mistrial because of the adverse publicity during trial. In addition, he contends,

inter alia, that the trial court improperly permitted the government to make references to Gigante's alleged connections to organized crime and improperly allowed the introduction of evidence of other crimes by Gigante and other persons. Gigante also argues that he was denied a fair trial by the prosecutor's improper inquiry as to whether Sirabella still feared Gigante. We have considered all of Gigante's contentions, singly and in combination, and find in them no basis for reversal.

A. *The Adverse Publicity*

On appeal, Gigante renews his arguments that the publicity was so prejudicial as to require a mistrial and that a hearing should have been held to determine the source of the "leak" of the information to the press. He cites as grounds for mistrial the sensational nature of the article, the references linking Gigante to organized crime and to loansharking, the timing of the article's release, the credibility of the newspaper's source, the pervasiveness of the medium, and the evidence of the jurors' exposure to the article. As to the need for a hearing, Gigante states that "the circumstances strongly suggest[] possible prosecutorial complicity" (Gigante brief on appeal at 25), and challenges the court's reliance on the "uncross-examined and conclusory assertion of the United States Attorney that no prosecutor had been involved." (*Id.*) We are unpersuaded.

The trial court has broad discretion in determining whether prejudice requiring the grant of a mistrial has resulted from publicity during a trial. *United States v. Persico*, 425 F.2d 1375, 1382 (2d Cir.) *cert. denied*, 400 U.S. 869 (1970). Each case must turn on its own facts, and the essential question is whether the jurors retained the requisite impartiality. *Id.* The trial judge is in the best

position to make such an evaluation. In a case in which (1) the publicity does not focus directly on the issue of the defendant's guilt or innocence with respect to the charges in the ongoing trial, (2) much of the potentially prejudicial matter has been adduced as competent evidence at trial, (3) the trial judge has taken prompt action to determine the effect of the publicity on the jurors, and (4) the judge has given or offered to give cautionary instructions, we will rarely second-guess his assessment that the jury's impartiality was not prejudicially affected by the publicity.

In the present case the trial judge was satisfied at trial that none of the jurors was prejudicially affected by the *Daily News* article, and we see no basis in the record to disturb his conclusion. The court promptly questioned each juror and received answers it considered to be "straightforward" (Trial Transcript at 1561), "candid[] and forthright[]" (June 10 Decision at 2), and that showed the jurors were "fully aware of their responsibilities and obligations," *id.* The court's conclusion that the jurors were not prejudicially affected was based in part on the jurors' responses and in part on the court's own view of the likely effect of the article. The court took into account the facts that the article dealt with an investigation unrelated to the present case (a view also expressed by one of the jurors), that the lengthy article's mentions of Gigante were brief, and that the jury had already heard considerable evidence to the effect that Gigante was a member of organized crime and was prone to violence.

In denying Gigante's posttrial motion relating to the publicity, the court found confirmation for its earlier views in the conduct and outcome of the jury's deliberations. The jury deliberated for four days, and during that time it asked to review selected exhibits, tapes, and

portions of testimony. It proceeded to reach verdicts of guilty on some counts and not guilty on other counts, indicating that the jurors had in fact, as they had indicated they would, approached their task "responsibly, objectively and conscientiously." *Id.* at 5. In all the circumstances we see no abuse of discretion in the district court's denial of the motions for a mistrial.

Nor is there any merit in Gigante's contention that the district court should have held a hearing as to whether the publicity was attributable to prosecutorial misconduct. The district court relied not only on the letter of the United States Attorney of May 13, 1983, but also on the June 3, 1983 affidavit of the Executive Assistant United States Attorney reporting on her investigation of the events leading to the disclosure. These documents provided an adequate basis for the court to conclude that the office responsible for the present prosecution played no role whatever in the misfiling of the FBI affidavit that apparently was read by the *Daily News* reporter and used as the basis for the article. Gigante has made no showing of prosecutorial misconduct, and no hearing was required.

B. *Evidentiary Contentions*

Gigante's principal claims of error in evidentiary rulings are that the court improperly allowed the prosecutor to make references to Gigante's alleged ties to organized crime and that it improperly allowed a variety of "other crimes" evidence. We are unpersuaded.[2]

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2 Nor do we find any error in the district court's admission of the expert testimony of FBI Agent Sponholtz that on February 1, 1981, Vodola dialed the digits of Gigante's phone number, which was based on a comparison of the amount of time required for return of the dial after each digit was dialed as recorded on tape on that date with the

1. *References to Organized Crime*

Gigante contends in general and in two specific instances that he was prejudiced by the government's references at trial to Gigante's alleged ties to organized crime. He claims that immediately after a side-bar conference, during which he asserts that the trial court limited the admissibility of references to organized crime, the prosecutor deliberately asked the following "leading and loaded question" (Gigante Brief on appeal at 31): "Now did there come a time when you met this loanshark connected to organized crime, Mario?" Gigante's attorney objected to the form of the question, the objection was sustained, and the prosecutor rephrased the question to omit the term "loanshark" and the reference to organized crime. On the following day the court instructed the jury that evidence that Vodola had told Sirabella that certain persons were members of organized crime was received in evidence not to prove that those persons were in fact members of organized crime but only to show (a) Vodola's intent in his dealings with Sirabella and (b) Sirabella's state of mind. This instruction was plainly correct.

Section 892(b)(3), concerning the making of extortionate extensions of credit, specifically contemplates that the trial court may admit evidence that "[a]t the time the extension of credit was made, the debtor reasonably believed" either (1) that his creditor had collected or attempted to collect extensions of credit by extortionate

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time required upon Sponholtz's subsequent test of the same phone. The trial judge is accorded broad discretion in the admission of expert testimony, *Hamling v. United States*, 418 U.S. 87, 108 (1974), and in this case it was not abused. The expert was well qualified and his test appears to have been accurate.

means or had punished nonpayment by extortionate means, or (2) that the creditor had a reputation for using extortionate means to collect extensions of credit or to punish nonpayment. Evidence that the debtor believed the loanshark was connected to organized crime is admissible to show the debtor's belief that the loanshark would use, or had a reputation for using, extortionate means to collect extensions of credit. *E.g.*, *United States v. Ochs*, 595 F.2d 1247, 1260 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979); *United States v. Zito*, 467 F.2d 1401, 1405 (2d Cir. 1972).

Given the court's proper instruction as to the purpose for which the organized crime references could be used, and given the context of the question to Sirabella, we see no prejudice to Gigante from such references. The form of the question was successfully challenged. The substance of the question was closely related to the prior—unobjected to—testimony of Sirabella to the effect that Vodola had told him that a man named Mario who was connected to organized crime would lend Sirabella money. The record does not support Gigante's contention that the substance of such a question had been barred by the court during the side-bar conference. And any possible adverse effect from the improper form of the stricken question was dispelled by the court's curative instruction.

Nor do we find any merit in Gigante's contention that the prosecutor's summation was unfairly prejudicial because it referred to Sirabella's "knowledge" that Gigante was connected to organized crime, and thus suggested that Gigante was in fact a member of organized crime, rather than referring more properly to Sirabella's belief or state of mind. The trial court found that, given its limiting instruction on use of references to organized crime, the jury would understand that the prosecutor was

referring to Sirabella's state of mind. Having reviewed the court's instructions and the prosecutor's remarks in context, we conclude that the trial court's evaluation was not incorrect and that no error occurred.

2. *"Other Crimes"*

Gigante challenges the trial court's decision to allow the jury to hear evidence of his gambling operation and his extortionate extensions of credit to persons other than Sirabella, and evidence of crimes committed by persons other than Gigante. Gigante did not object to any of this evidence at trial, and his present contentions have thus been waived. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977). In any event we find his contentions meritless.

The evidence that Gigante made extensions of credit to persons other than Sirabella was properly admitted to show, *inter alia*, the scope of the conspiracies charged in the indictment, *United States v. Barnes*, 604 F.2d 121, 166-67 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980), and to show the reasonableness of Sirabella's fear of Gigante which was induced by Vodola's descriptions of how other delinquent debtors had been dealt with by Gigante.

The evidence that Gigante operated a gambling establishment was relevant as background information to explain the extension of credit charged in count 3 of the indictment and the collection of that extension of credit by threats as charged in count 9; both counts related to an alleged gambling debt of Sirabella to Gigante. Evidence of the gambling operation thus was properly admitted. *E.g.*, *United States v. Shulman*, 624 F.2d 384, 391 (2d Cir. 1980); *United States v. Carino*, 417 F.2d 117, 119 (2d Cir. 1969). The fact that the jury acquitted Gigante on three

counts, including counts 3 and 9, suggests that, in any event, Gigante was not prejudiced by the admission of the evidence.

The evidence that Sirabella had been beaten by other loansharks was admissible as background to show how Gigante came to consolidate all of Sirabella's loans. Defendants did not object to this testimony but merely requested an instruction that the evidence of the beating was not offered to show that Gigante was responsible for it. The court gave such an instruction, and Gigante has no basis for a claim of error.

The evidence that someone had broken into Sirabella's apartment was also properly admitted. Defendants had announced that they would introduce into evidence post-break-in recordings of Vodola's conversations with Sirabella as exculpatory evidence because the tapes revealed Vodola'a friendliness toward Sirabella. The trial court did not abuse its discretion in allowing evidence of the break-in, together with the circumstantial evidence from which the jury could have inferred that Gigante was involved, in order to allow the jury to assess defendants' theory.

C. *Prosecutor's Improper Question*

Gigante complains that he was prejudiced by the prosecutor's improper questioning of Sirabella. At the very end of Sirabella's direct testimony, the prosecutor asked Sirabella, "Mr. Sirabella, as you sit there today, are you still afraid?" The defense objection was sustained. Sirabella nevertheless answered in the affirmative; his answer was stricken, and the jury was promptly cautioned that it must disregard that question and answer. Although we agree that the question at issue was improper, we conclude that it does not warrant a reversal.

The statute under which Gigante was prosecuted makes relevant a debtor's state of mind at the time the extension of credit was made and at the time a collection or an attempt at collection was made. 18 U.S.C. §§ 892(c), 894(c). Neither section makes relevant the debtor's state of mind at the time of trial. While evidence of a person's state of mind at a particular time may be admitted to show his state of mind at an earlier time if it is reasonable to assume a continuity between the two times, *see, e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 294, at 696 (2d ed. 1972), it is within the trial court's discretion to assess in that light the probative value of the proffered evidence, *id.*; *see* Fed. R. Evid. 403. Here the trial court excluded the evidence as improper, an assessment that appears correct in light of the more than two-year hiatus between the trial and Sirabella's last encounter with the defendants.

In all the circumstances, however, we conclude that the impropriety does not warrant reversal. The court struck the witness's answer and immediately gave an appropriate curative instruction. Given these prompt corrective measures and the previously received proper evidence of Sirabella's fears during his dealings with Gigante and of the threats and violence that had been directed against him by Gigante, the jury was unlikely to have been influenced by the prosecutor's improper question.

CONCLUSION

The judgment of conviction is affirmed. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA,

-against-

MARIO GIGANTE and
MICHAEL FRANK VODOLA,

Defendants.

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82 Cr. 607 (CES)

MEMORANDUM

DECISION

STEWART, District Judge:

On Sunday, March 6, 1983, the New York Daily News published an article on mob activity on the New Jersey waterfront. The article named defendant Mario Gigante as an "alleged Genovese capo" and included his picture. It stated that the mob activities reportedly included, among

other things, loan sharking and extortion. The story stated that it was based on "an FBI affidavit filed in federal court".

On Friday, March 4, the Government had presented its closing argument to the jury. The defendants were scheduled to make their summations on Monday, March 7. The prosecutor, William Baird called us the first thing Monday morning to advise us of the article. When court convened, Baird said that he had checked with the FBI in Newark (who were conducting the investigation involved)[1] and they thought "there had been some kind of leak". Defendants thereupon asked that we hold a hearing into the circumstances of the "leak" which we declined to do. Instead, each of the jurors was questioned individually by

the Court with counsel present. Four jurors said they had seen the article, eight others said they had heard it mentioned in the jury room, and two said they were not aware of it. Each juror said in words or substance that the matter would not affect their judgment. (Tr. 1533-59). The defendants then moved for a mistrial which was denied. The defendants also declined our offer to give a further curative instruction to the jury in the courtroom before summations resumed. Thereafter, summations proceeded and in due course the jury returned a verdict. The defendants were found guilty on six counts and not guilty on the remaining three counts.

Defendant Gigante has now renewed his motion for a mistrial and, alternatively, for a hearing into the question of possible prosecutorial misconduct.

At the conclusion of our individual questioning of the jurors on March 7, we were satisfied that neither the jury, nor any of its members, had been prejudicially infected by the article. The jurors answered questions candidly and forthrightly. None of them gave us the impression that he or she was being anything other than completely responsive and frank. They appeared to be fully aware of their responsibilities and obligations.

The article in question dealt with an investigation unrelated to this case; as one juror commented: "it had nothing to do with our case" (Tr.

1548-49). The references to defendant Gigante were brief; in the lengthy article his name appears only three times. The thrust of the article is directed at the activities of the Di Gilio gang on the New Jersey waterfront.

Significantly, the jury had heard considerable evidence to the effect that Mario Gigante was a member of organized crime and that he was prone to and had engaged in violence. As an element of the crime of extortion with which the defendants were charged, the prosecution has the burden of establishing that the defendant would use violence and was likely to engage in criminal conduct to enforce outstanding loans. The statutory definition, 18 U.S.C. §891(6), is:

> An extrotionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

Moreover, section 892(c)[2] states:

> In any prosecution under this section, if ... direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Also, section 892(b)(3) requires a showing that the debtor "reasonably believed" either (a) that extortionate collections or attempted collections of credit had been made by the defendant in the past, or (b) that the defendant

had a reputation for using extortionate means to collect loans. Evidence of past acts and reputation is therefore relevant to show what the debtor believed and also to show that his belief was reasonable. Such evidence may also be relevant to show the intent of the creditor. See United States v. Carbo, 314 F.2d 718, 741-42 n.35 (9th Cir. 1962).

Thus, one might argue that the Daily News article could have been received at trial as evidence of Gigante's reputation, with an appropriate limiting instruction.[3] There is authority that the use of reputation evidence is permissible even if "direct evidence of the actual belief of the debtor" is available. See 2 J. Weinstein & M. Berger, Weinstein Evidence, ¶405[04] which deals with

this question. We do not intend to suggest, of course, that we have reached a conclusion that the article would be admissible; rather, we intend only to emphasize the minimal prejudicial effect of the article under the circumstances.[4]

The jury deliberated for four days. During deliberations, they requested a number of exhibits, transcripts of all the tapes in evidence, the replaying of some of the tapes and the re-reading of various portions of the testimony. The jury's verdict found the defendants guily on six of the nine counts (all of which dealt with extortion), but not guilty on three counts. Their requests for information and acquittals on some counts further confirm our view that the jury undertook its task responsibly, objectively and

conscientiously, and that the article in question did not create prejudice (if any) sufficient to justify the declaration of a mistrial. See Sher v. Stoughton, 666 f.2d 791, 794 (2d Cir. 1981); United States v. Palmieri, 456 F.2d 9, 12 (2d Cir. 1972); United States v. Persico, 425 F.2d 1375 (2d Cir. 1970).

With respect to the application for a hearing as to possible misconduct, the in camera affidavit dated June 3, 1983[5] and the letter from the U.S. Attorney dated May 13, 1983 are dispositive; there is simply no indication of prosecutorial misconduct and nothing has been shown which would justify any hearing with respect to such a possibility. Moreover, in the absence of a showing of prejudice sufficient to justify a mistrial, such

a hearing would seem to be irrelevant under all circumstances. United States v. Rosenberg, 200 F.2d 666, 669-70 (2d Cir. 1952).

The motions are denied.

SO ORDERED.

/s/ Charles Stewart
United States District Judge

Dated: New York, New York
June 10, 1983

FOOTNOTES

1 It appears that the affidavit was filed under seal in the Southern District courthouse and later was removed from sealing and placed in public files. See the in camera affidavit of Jo Ann Harris.

2 A similar provision appears in section 894(c).

3 During the trial, when the witness Sirabella testified that Mario Gigante was a member of organized crime (e.g. Tr. 46, 59), we gave a limiting instruction (Tr. 165-66) to the effect that the testimony was received only as bearing on the victim's state of mind. The prosecutor, however, must also establish that the defendant intended to create an atmosphere of violence and criminal conduct.

4 Compare Marshall v. United States, 360 U.S. 310 (1959), where the newspaper article's contents had been explicitly held to be and clearly were inadmissible.

5 The closing paragraphs make clear the need for confidential treatment and that the inquiry does not now implicate prosecutorial misconduct.

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